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Supreme Court of the United States

OCTOBER TERM, 1948

No. 200

STATE OF NEW YORK, PETITIONER,

vs.

LEONARD H. CARTER, AS TRUSTEE IN BANKRUPTCY

No. 201

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

LEONARD H. CARTER, TRUSTEE OF UNION FABRICS, INC., BANKRUPT

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 6, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In Bankruptcy, No. 75,326

in the Matter of

UNION FABRICS, INC., Bankrupt

in the Matter of

The Application to disallow interest on tax claims filed by the United States of America and State of New York,

UNITED STATES OF AMERICA, Tax Claimant-Appellant,

STATE OF NEW YORK, Tax Claimant-Appellant,

LEONARD H. CARTER, Trustee-Appellee

STATEMENT UNDER RULE XV(b)

Appellee objected to the allowance by the referee of interest to the date of payment on the tax claims of the United States and the State of New York. Hearings were held before Referee Peter B. Olney on July 8, and July 22, 1946. On January 24, 1947, the referee overruled the objections. On February 13, 1947, the hearing on objections was reopened by consent and the referee adhered to his decision of January 24, 1947. On review, by orders dated August 21, 1947, Hon. John Bright reversed the referee from which orders the United States and the State of New York appeal. [fol. 2] By stipulation, an agreed statement of facts was entered into and the contents of the transcript of the record was designated to include so much of the papers as is germane to this appeal.

Hon. John F. X. McGohey, United States Attorney, Wm. M. Regan, Esq., Assistant United States Attorney, of Counsel, United States Court House, Foley Square, New York, N.Y., appears for the United States.

Hon. Nathaniel L. Goldstein, Attorney General of the State of New York, The Capital, Albany, N. Y., appears for the Tax Claimant, the State of New York.

Parker, Chapin & Flattau, Esqs., Sydney W. Cable, Esq., of Counsel, 285 Madison Avenue, New York, N.Y., and Glass & Lynch, Esqs., 170 Broadway, New York N.Y., appear for the Trustee.

There has been no change of parties or attorneys.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy No. 75,326

STIPULATION AS TO CONTENTS OF RECORD

Pursuant to Rule LXXV (f) of the United States Rules of Civil Procedure, counsel for the respective parties hereto hereby designate the parts of the record, proceedings, and evidence to be included in the record on appeal as follows:

1. The annexed Agreed Statement of Facts;

[fol. 3] 2. Notice of Appeal, filed on September 23, 1947, on behalf of the United States of America;

3. Notice of Appeal, filed on September 17, 1947, on behalf of the State of New York;

4. Order of the District Court, dated August 21, 1947, sustaining trustee's petition for review of order of referee entered in favor of the United States of America;

5. Order of the District Court, dated August 21, 1947, sustaining trustee's petition for review of order of referee entered in favor of the State of New York;

6. Consolidated decision of the District Court, dated August 13, 1947, sustaining petitions for review and reversing orders of referee;

7. Certificate of the Referee, dated March 5, 1947.

8. Consolidated memorandum of referee, dated January 24, 1947, overruling objections to allowance of interest beyond the date of the filing of the petition in bankruptcy;

9. Referee's Findings of Facts and Conclusions of Law dated January 24, 1947, on trustee's objections to claims of the State of New York;

10. Referee's Findings of Facts and Conclusions of Law dated January 24, 1947, on trustee's objections to claims of the United States of America (only portions which relate to the issue of payment of interest);

[fol. 4] 11. Minutes of hearing before referee held on February 13, 1947.

Dated: New York, New York, January 21, 1948.

John F. X. McGohey, United States Attorney for Southern District of New York, Attorney for the United States of America, Tax Claimant-Appellant, By: Wm. M. Regan, Assistant United States Attorney, Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for the State of New York, Tax Claimant-Appellant, By: Francis R. Curran, Assistant Attorney General. Parker, Chapin & Flattau and Glass & Lynch, Attorneys for Trustee-Appellee.

In United States District Court

Agreed Statement of Facts

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following is the agreed statement of facts to form part of the record on appeal herein:

1. An involuntary petition in bankruptcy was filed herein on December 20, 1939;

[fol. 5] 2. By notices of objection, dated July 1 and 2, 1946, the trustee filed objections to demands for interest beyond the date of the filing of the petition in bankruptcy on claims of the United States of America for social security (Title VIII and IX of Social Security Act), income and miscellaneous taxes (capital stock) and on claims of the State of New York for franchise and unemployment insurance taxes;

3. Interest demanded on said claims of the United States of America and of the State of New York from December

20, 1939, the date of the filing of the petition in bankruptcy, to the dates of filing the instant notices of appeal is in excess of $500 as to each claimant.

4. After consolidated hearings, the referee on January 24, 1947 filed separate Findings of Fact and Conclusion of Law and based thereon, the referee on the same day filed a consolidated memorandum overruling the trustee's objections to the allowances of interest to the date of payment. Separate orders to the aforesaid effect were entered by the referee on February 24, 1947;

5. Following a consolidated petition and order to show cause by the trustee, dated February 6, 1947, the hearing with respect to the objections as to interest was reopened before the referee on February 13, 1947 and upon such reopening, the trustee was permitted to offer proof of certain matters set forth in his petition as follows:

(a) An involuntary petition in bankruptcy was filed herein December 20, 1939.

[fol. 6] (b) A turnover proceeding was commenced by the trustee against Abraham Jeskowitz, President of the bankrupt by petition verified October 25, 1940 and that hearings in said proceeding were held from January 27, 1941 to May 6, 1942.

(c) That a turnover order of the Referee in Bankruptcy was entered February 23, 1943.

(d) That the turnover order was affirmed upon appeal by the United States District Court for the Southern District of New York on May 6, 1943.

(e) That the turnover order was affirmed by the Circuit Court of appeals, Second Circuit on July 21, 1944.

(f) That the petition of Abraham Jeskowitz for a writ of certiorari was denied by the Supreme Court of the United States on December 11, 1944, and his petition for rehearing was denied on January 2, 1945.

(g) That the petition of Abraham Jeskowitz to reopen the turnover proceeding before the referee was denied by order of the Referee dated November 29, 1944.

(h) That the motion of Abraham Jeskowitz to the Circuit Court of Appeals for leave to petition the Referee to reopen the turnover proceeding was denied by order of the Circuit Court of Appeals, dated February 9, 1945 and the motion for reargument thereon was denied by an order dated March 9, 1945.

(i) The Supreme Court denied the petition of Abraham Jeskowitz for a writ of certiorari to review that order on May 21, 1945.

[fol. 7] (j) That thereafter an order to punish Abraham Jeskowitz was made by the District Court for the Southern District of New York on September 10, 1945.

(k) The order punishing Abraham Jeskowitz for contempt was affirmed by the Circuit Court of Appeals, Second Circuit on February 14, 1946.

(l) That petition of Abraham Jeskowitz for a writ of certiorari was denied by the Supreme Court of the United States on May 6, 1946.

(m) That thereafter, Abraham Jeskowitz, pursuant to the contempt order dated September 10, 1945 was incarcerated in the Federal House of Detention.

(n) That an offer of settlement of all claims of the Trustee against Abraham Jeskowitz was accepted at a special meeting of creditors held on July 8, 1946 and the Trustee was authorized to accept said settlement and release Abraham Jeskowitz of all claims by the order dated July 15, 1946.

(o) That the total amount of allowed claims filed in this proceeding is $89,128.76.

(p) That the claims of the United States of America aggregate $9,865.35, the claims of the People of the State of New York aggregate $1,660.92, and that both aggregate $11,526.27.

(q) That the amount of interest, at the rate of six per centum (6%) per annum, on $11,526.27 from December 20, 1939 to February 6, 1947, the date of the trustee's petition to reopen the proceedings, is $4,930.08.

[fol. 8] (r) That the assets of the estate prior to receipt of the amount of the settlement payment of $30,000 was $19,888.11 in cash on deposit in two banks and a small lot of merchandise which the Trustee has been unable to get any bids upon.

(s) That the priority tax claims of The City of New York were allowed herein in the compromised amount of $3,564.70, inclusive of interest;

(t) That the interest claimed by the United States of America on its tax claims to the date of the filing of the petition in bankruptcy herein aggregated at least $1,026.67, and that the interest claimed by the State of New York on its tax claims to the date of the filing of the petition in bankruptcy herein aggregated $206.92.

6. At the reopened hearings on said February 13, 1947, the objections by the tax-claimants to the offer of proof of the matters set forth above were sustained by the referee on the ground that the issue was one of law and equitable considerations were therefore irrelevant and immaterial. This ruling of the referee was embodied in separate orders dated February 24, 1947, the same orders referred to in paragraph "4" above.

7. On March 3, 1947, the trustee petitioned for review of the said orders of the referee, dated February 24, 1947, which sustained the objections to the trustee's offer of proof and overruled the trustee's objections to the allowances of interest.

8. On review, Hon. John Bright, United States District Judge, by a consolidated decision, dated August 13, 1947, sustained the petitions for review and reversed the orders of the referee allowing interest on the claims of the United States of America and of the State of New York from the date of the filing of the petition to the date of payment and sustaining the objections to the trustee's offer of proof at the rehearing. Separate orders to the aforesaid effect were made on August 21, 1947 and thereafter entered on August 28, 1947.

9. The United States of America and the State of New York, by notices of appeal filed on September 23, 1947 and [fol. 9] September 17, 1947, respectively, appeal from the

aforesaid orders of the District Court made and entered on said decision.

10. The facts are not in dispute. The main issues presented are:

(a) whether it was mandatory under the law for the court of bankruptcy to allow so much of the tax claims of the United States and State of New York as constituted interest from the date of the filing of the petition to the date of payment;

(b) whether equitable considerations are relevant to a determination of the right of taxing agencies to such interest.

Dated: New York, New York, January 21, 1948.

John F. X. McGohey, *United States Attorney for Southern District of New York, Attorney for the United States of America, Tax Claimant-Appellant*, By: *Wm. M. Regan, Assistant United States Attorney.* Nathaniel L. Goldstein, *Attorney General of the State of New York, Attorney for the State of New York, Tax Claimant-Appellant*, By: Francis R. Curran, *Assistant Attorney General.* Parker, Chapin & Flattau and Glass & Lynch, *Attorneys for Trustee-Appellee.*

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL ON BEHALF OF THE UNITED STATES—Filed September 23, 1947

SIRS:

Please Take Notice that the United States of America hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order of the Honorable John Bright, District Judge, dated August 21, 1947, entered in this proceeding on August 28, 1947, sustaining the Trustee's petition for review, reversing the order of the Referee which allowed interest from the date of the filing of the petition in bankruptcy to the date of payment on the claims

of the United States of America and sustaining the objections to the Trustee's offer of proof at the rehearing and from each and every part thereof.

Dated: New York, N. Y., September 22, 1947.

John F. X. McGohey, *United States Attorney for the Southern District of New York, Attorney for Appellant.* By: William M. Regan, *Assistant United States Attorney,* Office & P. O. Ad-ress, United States Court House, Foley Square, New York 7, N. Y.

[fol. 11] To: Clerk, United States District Court, Southern District of New York, U. S. Court House, Foley Square, New York, N. Y.

Parker, Chapin & Flattau, Esqs., 285 Madison Avenue, New York, N. Y., Glass & Lynch, Esqs., 170 Broadway, New York, N. Y., Attorneys for Leonard H. Carter, Trustee-Appellee.

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL ON BEHALF OF THE STATE OF NEW YORK

Notice is hereby given that the State of New York, a tax claimant for unemployment insurance and franchise taxes, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the order of Hon. John Bright, District Judge, dated the 21st day of August, 1947, entered in this proceeding on the 28th day of August, 1947, sustain-[fol. 12] ing the trustee's petition for review, reversing the order of the referee which allowed interest on the claims of the State of New York for unemployment insurance and franchise taxes from the date of the filing of the petition to the date of payment and which further sustained the objections to the trustee's offer of proof at the rehearing, and the State of New York appeals from each and every part of said order.

Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for State of New York, Tax Claimant-Appellant. By Francis R. Curran, Assistant Attorney General, Address—Standard Building, 112 State Street, Albany, New York.

To: Clerk of the above Court. Parker, Chapin and Flattau, Esqs., 285 Madison Avenue, New York 17, N. Y. and Glass & Lynch, Esqs., 170 Broadway, New York 7, N. Y., Attorneys for Leonard H. Carter, Trustee-Appellee.

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF ENTRY OF ORDER

SIR:

Please take notice that the within is a true copy of an order made August 21st, 1947 and entered herein this day in the office of the Clerk of the United States Court for the Southern District of New York.

Dated: New York, N. Y., August 28, 1947.

Yours etc., Parker, Chapin and Flattau, Esqs., 285 Madison Avenue, New York 17, N. Y., and Glass & Lynch, Esqs., 170 Broadway, New York, N. Y., Attorneys for Trustee.

To: Hon. John F. X. McGohey, United States Attorney, United States Court House, Foley Square, New York, N. Y.

[fol. 14] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy No. 75,326

In the Matter of UNION FABRICS, INC., Bankrupt

ORDER SUSTAINING TRUSTEE'S PETITION FOR REVIEW

Leonard H. Carter, Trustee in Bankruptcy in the above entitled matter, having filed a petition to review so much of the order of Hon. Peter B. Olney, Referee, as overruled the Trustee's objections to the allowance of interest on the claims of the United States of America filed herein from the date of the filing of the petition in bankruptcy herein to the date of payment of said claims and to review the rul-

ing of said Referee sustaining objections to the admission of evidence with respect to the Trustee's offer of proof as to the matters set forth in said Trustee's petition dated February 6, 1947, and the same having regularly come on to be heard before me on April 23, 1947,

Now, upon reading and filing the five claims of the United States of America, as follows: $113.91, verified January 13, 1940; $1,594.56, verified February 15, 1940; $46.56, verified April 3, 1940; $8,059.49, verified June 13, 1940 and $60.83, verified July 10, 1940; the Trustee's notice of objections to said claims and notice of a hearing thereon, dated July 2, 1946; the petition of the Trustee, verified February 6, 1947 and the order to show cause thereon, dated February 6, 1947, why an order should not be made reopening the hearing with respect to the objections of the Trustee to said claims; the order of the Referee entered thereon, [fol. 15] dated February 24, 1947; the Trustee's petition for review, verified March 3, 1947; the certificate of the Referee upon said petition to review, dated March 5, 1947; and the minutes of testimony and exhibits accompanying the same; and after hearing the adverse interests herein to-wit: Parker, Chapin and Flattau, Esqs., and Glass & Lynch, Esqs., by Sydney W. Cable, Esq. of counsel, attorneys for the Trustee, in support of the petition to review and John F. X. McGohey, Esq., United States Attorney, by Frank J. Stella, Esq. of counsel, Attorney for the United States of America, in opposition thereto and due deliberation having been had and the opinion of the Court dated August 13, 1947 having been filed; it is on motion of Parker, Chapin and Flattau, Esqs., and Glass & Lynch, Esqs., attorneys for the Trustee,

Ordered, that the Trustee's petition to review be and the same hereby is sustained; that the orders of the Referee insofar as they allow interest from the date of the filing of the petition in bankruptcy to the date of payment on the sustaining the claims of the United States of America and [refusing to] J. B. objections to the trustee's offer of proof at the rehearing [consider the equities presented by the records in this proceeding,] * be and the same hereby are reversed.

Dated New York, N.Y., August 21st, 1947.

John Bright, U. S. D. J.

* Struck out in copy.

[fol. 16] In United States District Court

[Title omitted]

Notice of Entry of Order

Sir:

Please take notice that the within is a true copy of an order made August 21st, 1947 and entered herein this day in the office of the Clerk of the United States Court for the Southern District of New York.

Dated New York, N. Y., August 28, 1947.

Yours etc., Parker, Chapin and Flattau, Esqs., 285 Madison Avenue, New York 17, N. Y. and Glass & Lynch, Esq., 170 Broadway, New York, N. Y., Attorneys for Trustee.

[fol. 17] To: Nathaniel L. Goldstein, Esq., Attorney General of the State of New York, The State Tax Commission, 80 Centre Street, New York, N. Y.; Nathaniel L. Goldstein, Esq., Attorney General of the State of New York, New York State Department of Labor, 342 Madison Avenue, New York, N. Y.

In United States District Court, Southern District of New York

In Bankruptcy, No. 75,326

In the Matter of Union Fabrics, Inc., Bankrupt

Order Sustaining Trustee's Petition for Review

Leonard H. Carter, Trustee in Bankruptcy in the above entitled matter, having filed a petition to review the order of Hon. Peter B. Olney, Referee, overruling the Trustee's objections to the allowance of interest on the claims of the State of New York filed herein from the date of the filing of the petition in bankruptcy herein to the date of payment of said claims and to review the ruling of said Referee sustaining objections to the admission of evidence with [fol. 18] respect to the Trustee's offer of proof as to the matters set forth in said Trustee's petition dated Feb-

ruary 6, 1947, and the same having regularly come on to be heard before me on April 23, 1947.

Now, upon reading and filing the claim of the New York State Tax Commission for $1,403.14, verified May 29, 1940 and the claim of New York State Department of Labor, Division of Placement and Unemployment Insurance, verified June 4, 1940; the Trustee's notice of objections to said claims and notice of a hearing thereof dated July 1, 1946; the petition of the Trustee, verified February 6, 1947 and the order to show cause thereon, dated February 6, 1947, why an order should not be made reopening the hearing with respect to the objections of the Trustee to said claims; the order of the Referee entered thereon dated February 24, 1947, the Trustee's petition for review, verified March 3, 1947; the certificate of the Referee upon said petition to review, dated March 5, 1947; and the minutes of testimony and exhibits accompanying the same; and after hearing the adverse interests herein to-wit: Parker, Chapin and Flattau, Esqs., and Glass & Lynch, Esqs., by Sydney W. Cable, Esq., of counsel, attorneys for the Trustee in support of the petition to review and Nathaniel L. Goldstein, Esq., Attorney General of the State of New York, by Harry Zankel, Esq., of counsel, Attorney for the State of New York, in opposition thereto and due deliberation having been had and the opinion of the Court dated August 13, 1947 having been filed; it is on motion of Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for the State of New York.

[fol. 19] Ordered, that the Trustee's petition to review be and the same hereby is sustained; that the order of the referee allowing interest from the date of the filing of the petition in bankruptcy to the date of payment on the claims of the State of New York and sustaining the objections to the Trustee's offer of proof at the rehearing be, and the same hereby are reversed.

Dated: New York, N. Y., August 21st, 1947.

John Bright, U. S. D. J.

In United States District Court, Southern District of New York

Petition for review of orders of Referee in Bankruptcy.

Appearances:

Parker, Chapin & Flattau, Esqs., 285 Madison Avenue, New York City; Sydney W. Cable, Esq., of Counsel and Glass & Lynch, Esqs., 170 Broadway, New York City, for Leonard H. Carter, Trustee.

Honorable John F. X. McGohey, United States Attorney, Frank J. Stella, Esq., of Counsel for the United States.

Honorable Nathaniel L. Goldstein, Attorney General, 342 Madison Avenue, New York City, for the New York Industrial Commissioner and State Tax Commission.

[fol. 20] Opinion

Bright, U. S. D. J.:

The Trustee seeks a review of orders of Honorable Peter B. Olney, Referee, claiming that he erred (1) in allowing interest to the date of payment, instead of to the date of the filing of the petition herein, on claims of the Collector of Internal Revenue for social security taxes for the years 1936, 1937, 1938 and 1939, income taxes for 1935 and 1936, and a miscellaneous tax for 1935, aggregating in all $9,759.44, and on claims of the New York State Tax Commission for franchise taxes for 1936, 1937 and 1938, and of the State Department of Labor for unemployment insurance taxes, aggregating in all $1,085.97; and (2) in the rejection of evidence showing the litigation which had previously ensued in this proceeding, as bearing upon the equities which the Trustee claimed should have been considered in the determination of the question of interest.

I have come to the conclusion that interest should be allowed only to the date of the filing of the petition herein, and that the facts relating to the previous litigation should have been admitted and considered.

Were the court to be controlled by the principle of *stare decisis*, the Referee's determination finds support in *Davis v. Green*, C. C. A. 1, 133 F. (2d) 451; *Matter of Summers*, 45 A. B. R. (N. S.) 123; *Matter of Dorsey*, 46 A. B. R. (N. S.) 146; *Matter of Gandolfi & Co. Inc.*, 42 F. Supp. 706 and *Matter of Flayton*, 42 F. Suppl. 1002.

But recent decisions of the Supreme Court have shown that precedent is not always to be the guiding star. A court is not to be precluded by it "against the responsible [fol. 21] exercise of the judicial process". *Helvering v. Hallock*, 309 U. S. 106, 119. And when faced with precedent the court is not without power to decide otherwise where so doing would lead to a just result. *Erie v. Tompkins*, 304 U. S. 64, 92; *Graves v. Schmidlapp*, 315 U. S. 657, 665.

In *Vanston Committee v. Green*, 329 U. S. 156, 163, 165, where in a Chapter X reorganization a claim was made by a secured creditor for interest on interest and was opposed by subordinate creditors, it was written:

> "The general rule in bankruptcy and equity receivership has been that interest on the debtor's obligations ceases to accrue at the beginning of the proceedings. Exaction of interest, where the power of the debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved. * * * The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate. * * * Courts have felt that it would be inequitable for any one to gain an advantage or suffer a loss because of such delay. * * * It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor and between creditors and the bankrupt."

The sovereign prerogative, now in some respects urged by these two priority creditors, does not present an insurmountable barrier. Except as to priority of payment of [fol. 22] principal, they are not to be considered any more favorably than the general run of creditors. *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 396; *Federal Housing Administration v. Burr*, 309 U. S. 242, 245.

Some of the decisions supporting the Referee's determination question the present rule. Thus in Davie v. Green, force was conceded to the argument that the passing

of the Chandler Act had deprived tax claims of their former advantageous position as to interest in view of the inequitable and unjust effect upon general creditors. In matter of Dorsey *(supra)* the Referee in yielding to higher authority awarded the State interest to the date of payment. He nevertheless said (p. 147):

> "This may be the law, but a mere statement of the facts awakens a keen sense of injustice. If the thing is wrong and unfair, in principle, it is just as wrong and unfair when asserted by government as when asserted by an individual. If this be the law, it illustrates how the rigors of the law may well be relaxed by government to exemplify the will to do justice."

The Referee wrote in the Summers case, "I have grave doubts as to the soundness of the statement" that tax claims are to be paid in full to the date of payment. The Second Circuit held in *Hammer v. Tuffy,* 145 F. (2d) 447, 449, that since the passage of the Chandler Act the question must be regarded as an open one. And see Collier on Bankruptcy, 14 ed., vol. 3, at page 1843, where the author favors assimilating the treatment of tax claims to that of other claims, after a careful review of the changes made by the Chandler Act, showing a change in view of Congress with reference to the previous favorable treatment of tax claims.

[fol. 23] But, say the claimants, section 57j of the Bankruptcy Law is the same now as it was in 1938, and provides as then that debts owing to the United States or any state "as a penalty or forfeiture shall not be allowed except for the amount of the pecuniary loss sustained by the act, transaction or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law"; and that it is fair to assume that Congress, in its revision by the Chandler Act, was aware of the construction placed upon the words it had previously used, and had it wished to change that construction so as to place tax claims on the same footing with other claims it would have said so. But it is suggested that the silence of Congress as to the judicial interpretation of a statute is not decisive nor any good reason why the cases should not be re-examined and a contrary construction arrived at,

Helvering v. Hallock, *supra*, at page 119, where it is written:

> "It would require very persuasive circumstances enveloping congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities."

To treat tax claims, so far as interest is concerned, differently than other claims, I think is neither logical, sound nor just. On the contrary such treatment is a clear anomaly and cannot be justified except upon precedent now of doubtful validity since the passage of the Chandler Act. See *People* v. *American Loan & Trust Co.*, 172 N. Y. 371, 379.

[fol. 24] Such a ruling compels payment, not by the debtor whose debt it is, but by general creditors, who did not incur it, and who were not responsible for the delay in payment, out of their otherwise fractional recovery on their own claims.

The second claimed error, in view of what has been written above, does not present any serious question. The necessitated delay in the administration of this estate, to which the Supreme Court referred in the Vanston Committee case, and which was essential in order properly to preserve and protect the estate for the benefit of all interests, is demonstrated in an unusual degree here. It does not seem to me that the Trustee was required to introduce the facts which were rejected by the Referee. The same information was always accessible to the Court from an examination of its own files. It thus appears, if equitable considerations enter into the determination here sought, that the involuntary petition was filed December 20, 1939. Turnover proceedings were commenced against the bankrupt's president in October, 1940, which resulted in an order on February 23, 1943, requiring the turnover, affirmed by the District Court on May 6, 1943, by the Circuit Court of Appeals on July 21, 1944, and certiorari was denied on December 11, 1944. During the appeal the president petitioned to reopen the matter which was denied by the Referee on November 29, 1944, the Circuit Court of Appeals also

denied his request for leave to petition the Referee to reopen on February 9, 1945, and certiorari was denied on May 21, 1945. An order adjudging the president in contempt was granted on September 10, 1945, affirmed on appeal on February 14, 1946, and certiorari denied May 6, [fol. 25] 1946. He was imprisoned and then offered to settle for $30,000., the offer was accepted by the creditors on July 15, 1946, and the estate was increased by that amount after nearly six years of litigation.

It is not denied that prior to that settlement the assets were $19,888.11. The total of the claims is $89,128.76. The tax claims in question aggregate $11,455.41. If interest to the date of payment is allowed from December 20, 1939, when the petition was filed, an additional 48% must be added, and with administration expenses would exceed the estate prior to the increase by $30,000.

The allowance of interest to the date of payment, an accumulation caused solely because of delays necessitated by the successful efforts of the Trustee to protect and increase the estate, seems to me to be entirely inequitable, and to result in an unbalance of equities between the several creditors rather than a "balance of equities" which the Supreme Court says is the touchstone of each decision. It would do more. As I have written above, it would require the general creditors to pay the penalty caused by the delay necessitated to preserve and protect the estate.

I think it is time that precedents which lead to such an anomalous, inequitable and unjust result be overruled.

The petition for review is sustained, and the orders allowing interest to date of payment and refusing to consider the equities presented by the records in this proceeding are overruled. The order to be entered hereon will be settled on notice.

Dated: August 13, 1947.

John Bright, United States District Judge.

[fol. 26] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF THE REFEREE

To the Honorable, The Judges of the District Court of the United States for the Southern District of New York:

I, Peter B. Olney, the referee in charge of the above-entitled matter, do hereby certify, pursuant to § 39a (8), as follows:

The question certified for review is whether as referee I erred in making the orders dated February 24, 1947, sought to be reviewed and herewith submitted, in and by which I overruled trustee's objections to the allowance of interest on the claims of the State Tax Commission, New York State Department of Labor, Division of Placement and Unemployment Insurance, and Collector of Internal Revenue, from the date of the filing of the petition in bankruptcy herein to the date of payment of said claims, and allowed such interest. More specifically, error is claimed in the respects set forth in the petitions for review, verified March 3, 1947, and submitted herewith.

The facts are as found in referee's Findings of Fact and Conclusions of Law and Memorandum, all dated January 24, 1947, and herewith submitted.

There is also submitted herewith five claims of the Collector of Internal Revenue, as follows: $113.91, verified January 13, 1940; $1,594.56, verified February 15, 1940; $46.56, verified April 3, 1940; $8,059.49, verified June 13, 1940; and $60.83, verified July 10, 1940; the objections to said claims and notice of hearing, dated July 21, 1946; claims of the State Tax Commission for $1,403.14, verified May 29, 1940; claims of New York State Department of Labor, Division of Placement and Unemployment Insur-[fol. 27] ance in the sum of $282.83, verified June 4, 1940; objections of the trustee to the last two named claims and notice of hearing thereon dated July 1, 1946; stenographic record on said objections; petition of Leonard H. Carter, the trustee herein, verified February 6, 1947; and order to show cause hereon, dated February 6, 1947, why order should not be made reopening the hearing with respect to the objections of the trustee herein to said claims; steno-

graphic record thereon; order granting motion to certain extent dated February 24, 1947 and the exhibits.

Dated, New York, N.Y., March 5, 1947.

Respectfully submitted, (S.) Peter B. Olney, Referee.

Hearing on above certificate will be on the bankruptcy motion calendar in the United States Court House, Foley Square, New York City, on Wednesday, March 12, 1947, at 10:30 A. M. Notice thereof given to the attorneys.

(S.) Peter B. Olney.

[fol. 28] IN UNITED STATES DISTRICT COURT

MEMORANDUM DECISION OF REFEREE

Referee's Memorandum on Question of Allowing Interest on Taxes Due State of New York and the United States Until Date of Payment.

Various decisions by the United States Courts have held that interest should be paid until date of payment upon tax claims allowed in bankrupt estates.

See

United States vs. Childs, 266 U. S. 304.
Davie vs. Green, C. C. A. 1, 133 Fed. 2nd, 451.
Re: Semon D. C. Conn. 11 Fed. Supp. 18, modified on other grounds (C. C. A. 2nd) 80 Fed. 2nd, 81,
re: Summers (Referee Friebolin, No. Dist. Ohio, Eastern Division) 45 A. B. R. N. S. 123, 128-9.
Collier on Bankruptcy, 14th Edit. Vol. 3, p. 1841, *et. sec.*

Trustee relies upon a strong dicta in Hammer vs. Tuffy, (C. C. A. 2nd) 143 Fed. 2nd, 447, 449.

However, as the decision in Hammer vs. Tuffy (as distinguished from the dicta) had nothing to do with interest on taxes, I feel as did Referee Friebolin, *re* Summers *supra*, that I am bound by the decisions in point "until some decision is recorded directly upon this point by the Supreme Court or a Court whose decision is 'binding upon me'".

Hence my Conclusions of Law in my Findings dated the same date as this memorandum.

Dated, New York, January 24th, 1947.

Peter B. Olney, Referee.

[fol. 29] IN UNITED STATES DISTRICT COURT

REFEREE'S FINDINGS OF FACT ON OBJECTIONS TO CLAIM OF THE STATE OF NEW YORK

1. There is no dispute as to the amount of the tax. The only ground of objection is that interest should not be allowed up to the date of payment.

CONCLUSIONS OF LAW

First. Trustee's objection to allowance of interest on amount of claim as allowed up to date of payment is overruled for the reasons stated in a memordandum bearing the same date as these Findings.

Settle order on notice.

Dated, New York, January 24th, 1947.

Peter B. Olney, Referee.

[fol. 30] IN UNITED STATES DISTRICT COURT

REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ON OBJECTIONS TO CLAIM OF THE UNITED STATES

I, Peter B. Olney, the Referee in charge of the above entitled matter, do hereby make my Findings of Fact and Conclusions of Law on the objections filed by the trustee herein to the claim filed by the Collector of Internal Revenue.

FINDINGS OF FACT

1. The trustee has objected to the claim of the Collector of Internal Revenue in the sum of $8,059.49 on three grounds: (a) To the items of $112.23 and interest thereon of $3.68 under SS Title IX, Balance of year 1938. (This objection is conceded to be valid, S. M. 42); (b) To Income Tax items

as follows: Additional tax for fiscal year ending 1(31)38, $3537.66, interest thereon $469.20, and excess profit tax for same period $310.33 and interest thereon $41.16; (c) To the allowance of interest for any period subsequent to the date of the filing of the petition herein, December 20th, 1939.

* * * * * * *

Conclusions of Law

* * * * * * *

Fourth. Trustee's objections to allowance of interest on amount of claim as allowed till date of payment, is overruled for the reasons stated in a memorandum bearing the same date as these Findings.

Settle order on notice.

[fol. 21] In the District Court of the United States

[Title omitted]

Minutes of Hearing Before Referee

Before: Hon. Peter B. Olney, Referee.

Hearings on Objections to Claims of United States Government and State of New York

(July 8 and 22, 1946)

Motion of Trustee to Re-Open Hearing re Interest on Tax Claims

(February 13, 1947)

* *

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

HEARING OF JULY 8, 1946

New York, July 8, 1946, 3:45 o'clock P. M.

Before: Hon. Peter B. Olney, Referee.

Hearing on Objections to Claims of United States Government and State of New York

Proceeded Pursuant to Notice

* * * * * * *

IN UNITED STATES DISTRICT COURT

[Title omitted]

HEARING OF JULY 22, 1946

New York, July 22, 1946, 2:00 o'clock P. M.

Before: Hon. Peter B. Olney, Referee.

Adjourned Hearing on Objections to Claims of United States Government and State of New York

Proceeded Pursuant to Adjournment

* * * * * * *

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

HEARING OF FEBRUARY 13, 1947

New York, February 13, 1947,
3:45 O'clock P. M.

Before Hon. Peter B. Olney, Referee

MOTION OF TRUSTEE TO REOPEN HEARING RE INTEREST ON TAX CLAIMS, PROCEEDED PURSUANT TO NOTICE

Appearances:

Messrs. Parker, Chapin & Flattau and Messrs. Glass & Lynch, Co-Attorneys for Leonard H. Carter, Trustee, by Sidney W. Cable, Esq., of Counsel.

Hon. Nathaniel L. Goldstein, Attorney General of the State of New York, representing State Tax Commission, Claimant, by Anthony P. Ludden, Esq., Assistant Attorney General;

Hon. John F. X. McGohey, United States Attorney representing Collector of Internal Revenue, Claimant, by Frank J. Stella, Esq., Assistant United States Attorney.

Mr. Cable: This is a motion of the trustee to re-open the hearing upon the objections to tax claims and the payment of interest on the tax claims to the date of payment.

[fol. 34] The parties have agreed that an order may be entered on consent.

(There ensued informal discussion and oral argument.)

The Referee: I will grant this motion to re-open the proceedings and consider that Mr. Cable on behalf of the trustee is making an offer of proof of the facts set forth in paragraph 7 of his petition.

Mr. Cable: Subdivisions "(a)" to "(r)", inclusive. The point I make, sir, is that I should like Mrs. Mitchell to copy into the record those subdivisions in order that we will have a transcript to send up with your certificate.

The Referee: All right.

(The subdivisions are as follows:

"(a) An involuntary petition in bankruptcy was filed herein December 20, 1939.

"(b) A turnover proceeding was commenced by the Trustee against Abraham Jeskowitz, President of the bankrupt by petition verified October 25, 1940 and that hearings in said proceeding were held from January 27, 1941 to May 6, 1942.

"(c) That a turnover order of the Referee in Bankruptcy was entered on February 23, 1943.

"(d) That the turnover order was affirmed upon appeal by the United States District Court for the Southern District of New York on May 6, 1943.

"(e) That the turnover order was affirmed by the Circuit Court of Appeals, Second Circuit on July 21, 1944.

"(f) That the petition of Abraham Jeskowitz for a writ of certiorari was denied by the Supreme Court

of the United States on December 11, 1944, and his petition for rehearing was denied on January 2, 1945.

[fol. 35] "(g) That the petition of Abraham Jeskowitz to reopen the turnover proceeding before the Referee was denied by order of the Referee dated November 29, 1944.

"(h) That the motion of Abraham Jeskowitz to the Circuit Court of Appeals for leave to petition the Referee to reopen the turnover proceeding was denied by order of the Circuit Court of Appeals, dated February 9, 1945 and the motion for reargument thereon was denied by an order dated March 9, 1945.

"(i) The Supreme Court denied the petition of Abraham Jeskowitz for a writ of certiorari to review that order on May 21, 1945.

"(j) That thereafter an order to punish Abraham Jeskowitz was made by the District Court for the Southern District of New York on September 10, 1945.

"(k) The order punishing Abraham Jeskowitz for contempt was affirmed by the Circuit Court of Appeals, Second Circuit on February 14, 1946.

"(l) That petition of Abraham Jeskowitz for a writ of certiorari was denied by the Supreme Court of the United States on May 6, 1946.

"(m) That thereafter, Abraham Jeskowitz, pursuant to the contempt order dated September 10, 1945 was incarcerated in the Federal House of Detention.

"(n) That an offer of settlement of all claims of the Trustee against Abraham Jeskowitz was accepted at a special meeting of creditors held on July 8, 1946 and the Trustee was authorized to accept said settlement and release Abraham Jeskowitz of all claims by the order dated July 15, 1946.

"(o) That the total amount of allowed claims filed in this proceeding is $89,128.76.

[fol. 36] "(p) That the claims of the United States of America aggregate $9,865.35, the claims of the People of the State of New York aggregate $1,660.92, and that both aggregate $11,526.27.

"(q) That the amount of interest, at the rate of six per centum (6%) per annum, on $11,526.27 from December 29, 1939 to the date of this petition is $4,930.08.

"(r) That the assets of the estate prior to receipt of the amount of the settlement payment of $30,000 were $19,888.11 in cash on deposit in two banks and a small lot of merchandise which the Trustee has been unable to get any bids upon.")

Mr. Ludden: I want to put in an objection by the Attorney General for the State Tax Commission by the Attorney General for the State Department of Labor, Division of Placement and Unemployment Insurance. The State objects on the ground that the proof that is offered is immaterial and irrelevant, it is tantamount to a new trial; that this motion should be denied for the reason that the Referee has made his determination and his findings from the evidence submitted at the trial and that the only remedy the attorney for the trustee has is an appeal from the evidence adduced at the time of the trial. Upon that ground I object to the receiving of this evidence.

The Referee: All right.

Mr. Stella: The United States Government objects on the ground that the evidence and proof submitted by the trustee is immaterial and irrelevant. There is a question of law only involved.

The Referee: Now, Mr. Cable, you can refer to those cases that you had in mind.

[fol. 37] Mr. Cable: Your Honor will hear argument briefly on this point: the question of the priority of these tax claims and interest thereon governed by Section 64 of the Bankruptcy Act which contains only the words "paid in full".

Section 57k of the Bankruptcy Act requires that claims which have been allowed may be re-considered for cause and re-allowed or rejected in whole or in part according to the equities of the case.

The Bankruptcy Court under Section 2a of the Bankruptcy Act is vested with jurisdiction at law and in equity. However, in Continental Illinois National Bank & Trust vs. Chicago, Rock Island & Pacific Railway Company, 294 U. S. 648, the Supreme Court said (p. 675):

"The courts of bankruptcy are essentially courts of equity and that the words 'at law' probably having been

inserted only with regard to clause 4 of Section 2 of the Act which confers authority to arraign, try and punish bankrupts and others."

In a recent case entitled Vanston Bondholders' Protective Committee vs. Green, 91 Law Edition, 175, the Supreme Court held, after reviewing a number of these prior cases on the allowance of interest, that it was manifest that the touchstone of each decision on an allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor.

Accordingly it is the contention of the trustee that in view of the language of 64a and the necessity of construing that language, and in view of the dictum of the C. C. A. in Hammer vs. Tuffy that the equities of the facts in the instant case are most relevant and material to a determination of the interest issue presented to this court. Conse- [fol. 38] quently the offer of proof should be accepted because each of the facts relates to an equitable consideration.

The Referee: The motion to re-open is granted.

The objection to the receipt of the proof offered is sustained for the reasons I stated in allowing the interest in my findings and memorandum. In none of the decisions relied upon by the taxing authorities was there any consideration given to the equities of the case. The question of interest in the decided cases has been passed upon heretofore purely as a matter of law and I deem that I am bound to follow those decisions on the present state of the decided decisions regardless of considerations of equity, no matter how persuasive arguments may be made in any one individual case upon such equitable ground.

Therefore, the objections as I have stated to the offer of proof and the facts set forth are sustained on the ground that such facts are immaterial and irrelevant. The decision is one made purely as a matter of law.

The bankruptcy courts always have been held to proceed largely on equitable principles but they are also courts at law and there has never been any proceeding that I know of which would in effect permit the court to act upon the so-called equitable principles solely and wholly in deciding matters that come before it for decision. The wording of statutes applicable and decisions thereunder must be taken

as precedents binding upon the lower court when matters come before it for decision.

So you may enter the appropriate order and have this part of the record.

(Thereupon, at 4:30 o'clock P. M., the matter was concluded.)

[fol. 39] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

STIPULATION AS TO RECORD

It Is Hereby Stipulated and Agreed that the foregoing is a true and correct transcript of the record of the District Court in the above entitled matter, as agreed on by the parties.

Dated: New York, N. Y., January 21, 1948.

John F. X. McGohey, United States Attorney, by William M. Regan, Assistant United States Attorney; Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Tax Claimant-Appellant, by Francis R. Curran, Assistant Attorney General; Parker, Chapin & Flattau, and Glass & Lynch, Attorneys for Trustee, by Sidney W. Cable.

[fol. 40] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 195

(Argued March 8, 1948. Decided May 25, 1948.)

Docket No. 20909

LEONARD H. CARTER, Trustee of Union Fabrics, Inc., Bankrupt, Trustee-Appellee,

against

UNITED STATES OF AMERICA and STATE OF NEW YORK, Claimants-Appellants

Before Augustus N. Hand, Chase and Clark, Circuit Judges

Appeal from the United States District Court for the Southern District of New York

From an order of the District Court allowing interest on tax claims only to the date of the filing of the petition in bankruptcy, the United States and the State of New York appeal. Affirmed.

[fol. 42] John F. X. McGohey, United States Attorney, for United States of America, Claimant-Appellant; William M. Regan, Assistant United States Attorney, Counsel. Nathaniel L. Goldstein, Attorney General of the State of New York, for the State of New York, Claimant-Appellant; Wendell P. Brown, Solicitor General, and Francis R. Curran, Assistant Attorney General, Counsel.

Parker, Chapin & Flattau, and Glass & Lynch, Attorneys for Leonard H. Carter, Trustee-Appellee; Sydney W. Cable and Leslie Kirsch, Counsel.

Gerdes & Montgomery, Attorneys for New York Credit Men's Association, Amicus Curiae; W. Randolph Montgomery, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

An involuntary petition in bankruptcy was filed against Union Fabrics, Inc., on December 20, 1939. The United States and the State of New York filed tax claims, asking for interest to the date of payment of the claims. The ref-

eree overruled the objections of the trustee to the payment of interest on these claims beyond the date of the filing of the petition in bankruptcy and allowed such interest. The referee thereafter reopened the proceeding for the purpose of hearing a further objection by the trustee, based upon certain alleged equitable considerations, but sustained objections to this evidence and made an order to that effect. Upon a petition for review, the district judge reversed the [fol. 43] orders allowing interest on the claims to the date of payment and sustaining objections to the trustee's offer of proof at the rehearing. He held that interest on the tax claims should be treated in the same manner as interest on other claims and not allowed beyond the date of the filing of the petition. In respect to the evidence offered to show a long delay in the administration of the estate, he regarded such equitable considerations, if pertinent to the determination, as sufficiently shown by the records of the court to augment other reasons for the denial of interest.

Judge Chase and I do not agree with the decision of the court below and think that interest on tax claims should be allowed to the date of their payment under the settled ruling of the federal courts prior to the enactment of the Chandler Act in 1938—a ruling which we do not regard as changed by anything in that Act. We have however decided to acquiesce in the contrary decision of this court on this question in *Saper* v. *City of New York*, F. 2d , decided May 25, 1948, which represents the view of the majority of the five judges who have been concerned in *Saper* v. *City of New York* and the case at bar with the issue here involved. Such a mode of dealing with the appeal before us will settle the law in this circuit as to the allowance of interest on tax claims unless the Supreme Court should hereafter reach a different conclusion. However, we feel it advisable to state in more detail our personal views, which are in accord with those of the First Circuit in *Davis* v. *Green*, 133 F. 2d 451.

It is not disputed that prior to the Chandler Act taxes bore interest down to the date of payment. This was decided under the provisions of Section 57-j of the Bankruptcy Act, by this court in *In re J. Menist*, 290 Fed. 947, and its determination as to the duration of the period for which interest was to run against bankrupt estates was [fol. 44] followed without discussion by the Supreme Court in *United States* v. *Childs*, 266 U.S. 304, though this very

question was raised in the arguments of counsel as reported. This rule remained unchanged prior to the passage of the Chandler Act in spite of the fact that in 1926 Section 64-a was amended to alter the absolute priority of taxes theretofore existing as compared with various other preferred claims. *Cf. Horn* v. *Boone County, Neb.*, 44 F. 2d 920 (C. C. A. 8); *In re Semon*, 11 F. Supp. 18 (D. C. D. Conn.), modified on other grounds, 80 F. 2d 81 (C. C. A. 2).

The Chandler Act amendments broadened Section 57(n), 11 U. S. C. A. § 93(n) to include "all claims of the United States" and required them to "be proved and filed in the manner" there provided; it also deleted Section 64(a), 11 U. S. C. A. § 104(a) requiring "the trustee to pay all taxes legally due and owing," but made no substantial change, if any, in the order of priorities. However only a minor verbal change, not pertinent to this appeal was made in Section 57(j), 11 U. S. C. A. § 93(j); indeed, that is the only change in this section since the Bankruptcy Act of 1898.

As we have already observed, prior to the Chandler Act the governments' claims to interest on taxes down to the date of payment was clear under a settled interpretation of the bankruptcy statute. We need not discuss the question whether governments do well to obtain any priorities over their citizens in payment of taxes, but priorities are given by statute and we think should not be modified by doubtful implication. We agree with Judge Woodbury's opinion in *Davie* v. *Green, supra*, that Congress would not have made such a far-reaching change as would result by reversing these prior interpretations without clear and specific enactment. As we have noted, only a minor alteration, irrelevant to this question, was made in Section 57-j by the Chandler Act, though the settled meaning of that section [fol. 45] must have been known to the Congressional Committees and many other fundamental changes were made when the bankruptcy law was being thoroughly revised by that Act. Furtner, if there had been any intention to alter the settled meaning of Section 57-j we think it would have been made evident by Congressional reports and debates, and the federal and state governments would not have been deprived of important priorities by means of a conjectural interpretation. The apparent absence of such evidence of legislative intention seems to us to argue for sustaining the prior judicial interpretation of the section rather than for any new meaning.

It is argued that since Section 57(n) requires that tax claims must be proved and filed like other claims and they are classified as debts in Section 64(a), they are subject to the ordinary rule applied to other claims that interest runs only to the date of the filing of the petition in bankruptcy. But the requirement for filing proofs of tax claims was primarily to facilitate the prompt and orderly administration of bankrupt estates and to enable the trustee safely to distribute assets with exact knowledge of all claims by preventing the representatives of governments from inordinately delaying presentation of their tax claims while interest thereon was still running. If is true that in *United States* v. *Roth*, 164 F. (2d) 575, we allowed a trustee in bankruptcy to set off against a tax claim a mutual indebtedness of the government. However, in that opinion we allowed the set-off which, as compared with an alternate judicial remedy of suit in a district court or the Court of Claims, was a procedural rather than a substantive matter and we regarded this result as indicated by the order of the Supreme Court prescribing forms for filing, which expressly referred to set-offs against the claimant. This decision does not lead to the conclusion that tax claims, though [fol. 46] they must now be proved as ordinary debts, should be reduced in the amount of their recovery from the estate by the elimination of interest subsequent to the date of the petition in bankruptcy. Indeed, we return to the conclusions of the First Circuit that so fundamental an alteration of settled rights as to the incidence of tax claims should have much stronger support than the analogy of the treatment of other claims.

As heretofore stated and in spite of the contra views expressed in this opinion the orders of the District Court are affirmed upon the authority of *Saper* v. *City of New York*, *supra*.

CLARK, Circuit Judge (concurring):

I concur in the result.

[fol. 47] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of May one thousand nine hundred and forty-eight.

Present: Hon. Augustus N. Hand, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

In the Matter of UNION FABRICS, INC., Bankrupt, UNITED STATES and STATE OF NEW YORK, Claimants-Appellants.

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed upon the authority of Saper v. City of New York in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 48] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Union Fabrics, Inc., Bankrupt. 195. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed May 25, 1948. Alexander M. Bell, Clerk.

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 200

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is assigned for hearing immediately following No. 168, City of New York vs. Saper, as Trustee.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 51] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 201

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is assigned for hearing immediately following Nos. 168 and 200.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: (File Nos. 53,202, 53,203. U. S. Circuit Court of Appeals, Second Circuit. Term No. 200. State of New York, Petitioner, vs. Leonard H. Carter, as Trustee in Bankruptcy. Term No. 201. The United States of America, Petitioner, vs. Leonard H. Carter, Trustee of Union Fabrics, Inc., Bankrupt. Petitions for writs of certiorari and exhibit thereto. Filed August 5, 1948. Term Nos. 200 O. T. 1948, 201 O. T. 1948.